

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB -01 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2006-0019
Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAVID ANTHONY MARTINEZ,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044303

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Stephan J. McCaffery

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 Appellant David Martinez was convicted after a jury trial of molestation of a child. The jury found the victim was under twelve years old, and the trial court sentenced

Martinez to a mitigated, ten-year prison term. On appeal, he argues the trial court erred in precluding hearsay evidence, insufficient evidence supports his conviction, and “the prosecution was duplicitous.” We find no error and affirm.

Factual and Procedural Background

¶2 We view the facts and any reasonable inferences from those facts in the light most favorable to sustaining the jury’s verdict. *See State v. Hollenback*, 212 Ariz. 12, ¶ 2, 126 P.3d 159, 161 (App. 2005). In August 2004, ten-year-old B. was at home watching a movie with her younger brother, N. Her older brothers, T. and D., had friends visiting the house, including Martinez. B. fell asleep on the couch under a sheet; she awoke to find Martinez kneeling beside the couch with his head under the sheet. B. knew it was Martinez because “he [was] the only one that ha[d] a bald head.” Martinez reached through the leg opening of B.’s shorts and touched her “private part.” He also touched B.’s “butt.” B. “slapped his head and told him to stop.” N., nine at the time of trial, testified he had fallen asleep during the movie and woke up when Martinez was under the sheet and touching B. N. confirmed that B. had slapped Martinez’s head and said, “Stop.” After he knew Martinez had left, N. told their mother. She later called the police.

Sufficiency of Evidence

¶3 Martinez argues the trial court erred by denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., contending insufficient evidence supported the jury’s verdict. We review the denial of a Rule 20 motion for a clear

abuse of discretion. *Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d at 161. A judgment of acquittal is appropriate only when there is no substantial evidence to support a conviction. Ariz. R. Crim. P. 20(a); *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). In determining the sufficiency of the evidence to withstand a Rule 20 motion, we view the evidence in the light most favorable to sustaining the verdict. *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). “If reasonable [persons] could differ as to whether the evidence establishes a fact in issue, that evidence is substantial.” *Id.*

¶4 Section 13-1410, A.R.S., defines the offense of child molestation as “intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age.” The relevant definition of sexual contact in A.R.S. § 13-1401(2) is “direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body.”

¶5 B. testified she had fallen asleep while watching a movie and had awakened to find Martinez with “his head under the sheets,” and trying to “put his hands in [her] pants.” She further stated Martinez touched her “underneath [her] shorts” on her “private part” by reaching through the leg opening of her shorts. B. repeated that Martinez had been “rubbing [her] private part” and testified he had also touched her on her “butt.” The detective who observed B.’s initial interview testified B. “had a little trouble with . . . language skills as far

as being able to be very specific about what had happened, but she was able to get across what had happened.”

¶6 On appeal, Martinez argues for the first time that B.’s testimony about his touching her “private part” is too vague to support his conviction. But jurors are permitted to use their everyday knowledge and common sense in deliberations. *State v. Dickens*, 187 Ariz. 1, 16, 926 P.2d 468, 483 (1996) (“The basic facts were in evidence, and the jurors simply used the knowledge gained from personal experience to draw inferences from that evidence.”). The jurors had doubtless heard before, if not used, the term “private part” and had an understanding of what body part it refers to.

¶7 Martinez relies on *State v. Carter*, 123 Ariz. 524, 525, 601 P.2d 287, 288 (1979), and *State v. Anderson*, 128 Ariz. 91, 93, 623 P.2d 1247, 1249 (App. 1980), to support his claim of vagueness, but both of those cases interpreted the former version of A.R.S. § 13-1410. Until 1994, that statute forbade “directly or indirectly touching the private parts” of a child. 1993 Ariz. Sess. Laws, ch. 255, § 29. *Anderson* addressed a trial court’s failure to give any jury instruction defining “private parts,” 128 Ariz. at 93, 623 P.2d at 1249, and *Carter* determined that the term “private parts” did not include the female breast, but only “the genital and excretory organs.” 123 Ariz. at 525, 601 P.2d at 288. The current version of § 13-1410 forbids sexual contact “except sexual contact with the female breast.” The definition of sexual contact in A.R.S. § 13-1401, quoted above, includes specific language instead of the term “private parts,” and the jury instructions in this case reflected the current

statutory language. We also note neither party has cited *State v. Morgan*, 204 Ariz. 166, ¶ 24, 61 P.3d 460, 467 (App. 2002), where the victim’s testimony that Morgan had “touched her between her legs” was held to be “adequate proof of the molestation.”

¶8 Because the jury could have inferred from B.’s testimony that Martinez had touched her genitals, *see Mincey*, 141 Ariz. at 432, 687 P.2d at 1187, the trial court did not err in denying his Rule 20 motion. *See Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d at 161.

Duplicitous Prosecution

¶9 As best we understand Martinez’s “duplicitous” prosecution argument, he contends that B.’s references to both her private part and her butt constituted two separate offenses that could have resulted in nonunanimous jury verdicts. His cited authority, however, does not appear to support his claim, and he concedes he failed to raise this claim at trial or in a motion for new trial. Accordingly, we review the issue only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶10 Martinez cites *State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App. 1993), a case that addressed the propriety of consecutive sentences imposed for convictions for multiple, separately charged sexual offenses. He also cites *State v. Woods*, 141 Ariz. 446, 456, 687 P.2d 1201, 1211 (1984), which held a first-degree murder conviction could be based on either premeditation or felony murder or both, as long as the jury unanimously believed first-degree murder had been committed. Finally, Martinez relies on *State v. Davis*, 206 Ariz. 377, ¶¶ 67-71, 79 P.3d 64, 78 (2003), to support his contention the verdict might have been

“non-unanimous,” and thus, his conviction must be reversed. This case, however, is factually more similar to *State v. Schroeder*, 167 Ariz. 47, 52-53, 804 P.2d 776, 781-82 (App. 1990), a decision not mentioned by either party but cited in *Davis*, 206 Ariz. 377, ¶ 56, 79 P.3d at 76.

¶11 In *Schroeder*, the defendant had been charged with a single count of sexual abuse, 167 Ariz. at 48, 804 P.2d at 777, but the victim had testified about multiple acts of “fondling or attempted fondling.” *Id.* at 52-53, 804 P.2d at 781-82. *Schroeder* argued “the possibility that all of the jurors might agree that some acts of fondling had occurred, without unanimously agreeing upon the specific acts of fondling” required reversal of his conviction. *Id.* Like Martinez, *Schroeder*’s defense was that no improper acts had occurred. *Id.* at 53, 804 P.2d at 782. Division One of this court determined the issue before the jury was credibility and noted “the jury’s verdict . . . implies that it did not believe the only defense offered.” *Id.* The *Schroeder* court held: “[T]he possibility that the jury might have found that some but not all of the alleged acts occurred is irrelevant so long as they unanimously agreed that the child had been sexually abused by [the] defendant.” *Id.* Here, it is apparent the jury believed B.’s testimony, did not believe Martinez’s defense, and unanimously agreed Martinez had molested B. Thus, there was no “duplicity” and no error, fundamental or otherwise.

Hearsay

¶12 Martinez next claims the trial court erred by precluding testimony about an exculpatory statement he allegedly made when B.’s family confronted him the day after the incident. The state contends Martinez’s statement was properly precluded under Arizona law. We review a trial court’s decision to admit or exclude evidence for a clear abuse of discretion. *State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990).

¶13 Martinez complains the court improperly struck defense witness testimony about his alleged denials when he was first accused of touching B., and erroneously prevented their relating his exculpatory words after permitting the state’s witnesses to testify he had responded by saying, “[S]he came on to me.” Martinez cites Rule 801, Ariz. R. Evid., 17A A.R.S., to support this claim of error. As the state points out, however, a defendant’s own exculpatory statement is inadmissible hearsay “unless it falls within a recognized exception to the hearsay rule.” *State v. Wooten*, 193 Ariz. 357, ¶ 47, 972 P.2d 993, 1002 (App. 1998); *see also State v. Tinajero*, 188 Ariz. 350, 354, 935 P.2d 928, 932 (App. 1997) (prior exculpatory statements are inadmissible hearsay); *Barger*, 167 Ariz. at 565-66, 810 P.2d at 193-94 (trial court did not err by excluding defendant’s self-serving hearsay statements).

¶14 The trial court sustained the state’s objection after the witnesses repeated Martinez’s alleged exculpatory statement, but permitted three defense witnesses to testify they did not hear Martinez say, “[S]he came on to me,” and allowed one of the witnesses to

testify Martinez had not made that statement. Moreover, Martinez himself testified about what he had said in response to being confronted.

¶15 Martinez argues that “[b]ecause the issue of what [he] said went toward whether or not he acknowledged that something had occurred the night before, evidence of what [he] said was not hearsay.” He also asserts he “was entitled to present evidence in his defense, particularly evidence that rebutted the state’s evidence of what he said.” Martinez, however, cites no authority for either of these arguments, nor did he raise them below. He has thus forfeited all but fundamental error review on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *see also State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) (“[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.”).

¶16 To the extent Martinez’s arguments may invoke the rule of completeness, *see State v. Powers*, 117 Ariz. 220, 226, 571 P.2d 1016, 1022 (1977), we find any arguable error would be harmless. In *Powers*, the supreme court stated: “Generally, ‘whenever part of a conversation is given in evidence by one party, the other may offer the whole conversation.’” *Id.* at 226, 571 P.2d at 1022, *quoting State v. Lovely*, 110 Ariz. 219, 220, 517 P.2d 81, 82 (1973). But, in *State v. Prasertphong*, 210 Ariz. 496, ¶ 15, 114 P.3d 828, 831 (2005), *quoting United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996), the court said that the rule only requires “admission of those portions of the statement that are ‘necessary to qualify, explain or place into context the portion already introduced.’” But even if his denials were

admissible as part of the same exchange in which the statement was made, any error was harmless beyond a reasonable doubt because the statements Martinez sought to introduce were presented to the jury through his own testimony when he told the jury what he said in response to being confronted by B.'s family members. We therefore cannot say any fundamental error occurred. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶17 Martinez also argues the court's exclusion of this hearsay prevented him from presenting his defense and, thus, violated his due process rights under the Sixth and Fourteenth Amendments. By failing to raise this claim below, Martinez has waived appellate review absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. We review a Sixth Amendment claim *de novo*. *State v. Blackman*, 201 Ariz. 527, ¶ 41, 38 P.3d 1192, 1203 (App. 2002).

¶18 In *State v. Davis*, 205 Ariz. 174, ¶ 33, 68 P.3d 127, 132 (App. 2002), Division One of this court held: "[A] defendant's constitutional rights are not violated where, as here, evidence has been properly excluded." *See also State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988) (Sixth Amendment right to present evidence limited to relevant evidence); *State v. LaGrand*, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987) (proper exclusion of hearsay evidence does not violate due process rights). Martinez was precluded from introducing hearsay evidence, which he was not necessarily entitled to do, but his ability to present his absolute innocence defense was not impaired by that preclusion, *see State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) (defendant's constitutional right to present a defense

is limited by evidentiary rules), particularly since the substance of the precluded testimony was, in fact, presented to the jury. There was no fundamental error in the court's exclusion of the hearsay statements. *See State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991); *State v. Alvarez*, 213 Ariz. 467, ¶ 8, 143 P.3d 668, 670 (App. 2006).

Disposition

¶19 Martinez's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge